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# Supreme Court of the United States

..... TERM, 19.....

No. 561

ANTHONY ADAMO,

*Petitioner,*

*vs.*

LLOYD W. McCORKLE, Acting Principal Keeper of the New Jersey State Prison at Trenton,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF.

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ANTHONY ADAMO,

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Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Anthony Adamo, of the Borough of Lodi, Bergen County, and State of New Jersey, prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered upon November 23, 1953, reversing the judgment of the Appellate Division of the Superior Court of New Jersey entered upon July 21, 1953.

### Opinions Below.

The opinion of the New Jersey Supreme Court is reported in 13 N. J. 561, 100 Atl. 2d 674 (R. 32). The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 26 N. J. Super. 562, 98 Atl. 2d 597 (R. 15).

## Basis of Jurisdiction.

1. The judgment of the New Jersey Supreme Court was entered on November 23, 1953 (R. 39). The jurisdiction of this Court is invoked under the due process clause of the Fourteenth Amendment and also under Section 1257(3) of Title 28 of the United States Code, setting forth the final judgments by the highest court of a State which may be reviewed by this Honorable Court.

2. The Supreme Court of the State of New Jersey is the highest court of the State.

3. The judgment of which review is sought is a final judgment of the Supreme Court of New Jersey (R. 39).

4. The judgment herein sought to be reviewed was filed on November 23, 1953 (R. 39).

5. The Federal question of substance which has been decided by the State Court is one concerning due process of law and double jeopardy, namely, that a trial court, two and one-half years after sentencing a defendant to be put on probation for five years and fined $500.00, no mention whatsoever being made of the suspension of any prison sentence, has the power upon "violation of probation" to super-add a prison term of not less than two, nor more than three years in State Prison, to the original sentence.

The decision of the Supreme Court of New Jersey is in conflict with the decisions of this Honorable Court in the following cases:

*Ex Parte Lange,* 18 Wall. 163, 21 L. Ed. 872 (1873);

*Roberts* v. *United States,* 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41 (1943);
*United States* v. *Benz,* 282 U. S. 304, 51 S. Ct. 113, 75 L. Ed. 354 (1931);
*United States* v. *Murray,* 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 (1928).

6. The federal question was timely raised and considered. The Supreme Court of New Jersey held that the prison sentence superimposed two and one-half years after the original sentence, was not contrary to due process of law (R. 38).

## Statutes Involved.

The statutes involved are set out in the Appendix, *infra,* pages 19-21.

## Questions Presented.

1. Is the action of a trial court in sentencing a defendant to be put on probation for five years, and in addition fined $500.00, a *sentence* or a *suspension of sentence?*

2. May a trial court, two and one-half years after sentencing a defendant to be put on probation for five years and fined $500.00, no mention whatsoever being made of the suspension of any prison sentence, super-add, upon "violation of probation," a prison term of not less than two, nor more than three years in State Prison, to the original sentence?

3. Is such super-added prison sentence double jeopardy and therefore without due process of law in contravention of the 14th Amendment?

## Statement of Matter Involved.

The facts are not in dispute and we therefore adopt the following statement from the opinion of the New Jersey Supreme Court which sets up the controlling facts concisely:

> "The Appellate Division, 26 N. J. Super. 562, 98 A. 2d 597, by a divided vote, reversed the Law Division's order discharging the writ of habeas corpus which the plaintiff Anthony Adamo had obtained.
>
> On January 23 and 24, 1950, Anthony Adamo was tried on two indictments for assault. The jury found him guilty as charged in both indictments and on February 8, 1950, the State moved for sentence. At that time the trial court made the following pronouncement:
>
> > 'It is the judgment of this court that this defendant be put on probation for a period of five years. He is to report once a week to the Probation Officer of this County, the time and place to be fixed by the Probation Office. He is to obey all the rules of the Probation Office which generally speaking means that he is to observe the law of this State, of the United States, and of any State where he may be permitted to go. He is not to leave the State of New Jersey without the permission of either the Probation Officer or the Judge of the Court. In addition to this, he will be fined $500.00. This fine may be paid in installments.'
>
> On May 16, 1952 Adamo was charged with violation of his probation. Prior to that date the $500 fine had been paid. Hearings on the charge of violation of probation were held and on August 13, 1952 there was a finding of guilty, the probation was revoked and Adamo was remanded to the Bergen County jail to await sentence. On August 20, 1952, he was sentenced to concurrent terms of not less than two nor more than three years in State Prison.

> Thereafter Adamo obtained a writ of habeas corpus, contending that the fine was the original sentence imposed upon him, that payment executed the sentence, and that the court lacked power to impose the later prison sentence. The writ was discharged in the Law Division. On his appeal to the Appellate Division a majority of the court held that since the judgment of probation was not preceded by an express declaration that imposition of sentence was being suspended, it was void, thus leaving the fine as the valid and fully executed sentence. Judge Francis, dissenting, found that the judgment of probation for five years necessarily meant that the imposition of sentence was being suspended and there was no need for any further formal expression to that effect; he considered that the fine was simply one of the several conditions of probation and that its payment in nowise altered or terminated Adamo's clear obligation to comply with all other terms of the probation."

The opinion of the New Jersey Supreme Court stated that the court was in full agreement with the position taken by Judge Francis. The judgment entered in the Appellate Division of the Superior Court of New Jersey was then reversed and the Law Division's Order discharging the writ of habeas corpus was reinstated.

The reason for the opinion of the Supreme Court of New Jersey appears clearly in its opinion. It stated, first, that the placing of the defendant upon probation for a period of five years and ordering the payment of a fine of $500.00 was not a sentence, but a suspension of sentence. The subsequent sentence, imposed upon "violation of probation," of not less than two nor more than three years in State Prison was held to be the only sentence imposed and therefore not contrary to due process of law.

## Reasons for Granting the Writ.

The Supreme Court of New Jersey has decided an important question arising under the Fourteenth Amendment to the Constitution of the United States. It holds that the judgment of a trial court that a defendant, upon conviction, be put on probation for a period of five years and fined $500.00, necessarily meant that the imposition of sentence was being suspended, and that although the fine of $500.00 had been paid, the trial court could, two and one-half years later, upon finding the defendant guilty of "violation of probation," sentence the defendant to a term of not less than two, nor more than three years in State Prison.

The Supreme Court of New Jersey held that "In the instant matter the defendant received, in full measure, not only the protection of our firmly embedded concepts of due process and fair play, but also the benefits of the current penological approaches."

The decision of the Supreme Court of New Jersey manifestly sanctions the imposition of two sentences upon a defendant for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.

As the Appellate Division of the Superior Court of New Jersey stated in its opinion, reported in 26 N. J. Super. 562, 98 A. 2d 597, reversed by the New Jersey Supreme Court:

> "Assuming the right of the sentencing court here to impose a fine and to place the defendant on probation as to imprisonment, the fact is that not a word was uttered by it with respect to imprisonment or the suspension of its imposition or execution or about placing the plaintiff on probation as to it.
>
> "An offender standing before the court after conviction should be apprised exactly of what sentence

is imposed upon him, what part of it, if any, has been suspended, and if he be placed on probation what conditions he must comply with. It would not be right, proper or fair to hold that a suspension of sentence as to imprisonment is implied or inherent in the placing of an offender upon probation where a fine is simultaneously imposed upon him.

"Since there was no suspension of the imposition or execution of a prison sentence here, and as there was a fine imposed which was fully paid prior to the proceeding in which the plaintiff was tried for probation violation, the sentencing court had no power to sentence the plaintiff to state prison as a probation violator and such sentence is void. The sentence imposed originally had been executed." Cf. *Roberts* v. *United States,* 320 U. S. 264 (1943).

The Supreme Court of New Jersey has erroneously decided a federal question of substance in a way probably not in accord with applicable decisions of this court, and with the decisions hereinbefore set forth in paragraph 5 under Basis of Jurisdiction.

The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. We believe that the Fourteenth Amendment affords the accused similar protection against State action. This Honorable court has on a number of occasions reviewed State judgments to ascertain whether the accused had been twice put in jeopardy of life or limb, but in all of those cases the court decided that the accused were not put in jeopardy for the second time for the same offense, and therefore it was not necessary for this Honorable court to go further and decide whether such right is protected by the Fourteenth Amendment. We believe that the case *sub judice* squarely presents this issue and that

such a ruling should not be allowed to stand in the absence of a review by this court of the judgment below.

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this court may review the final judgment and decision of the Supreme Court of New Jersey and determine whether that Court has deprived petitioner of rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

### I.

### Opinions of the courts below.

The opinion of the New Jersey Supreme Court is reported in 13 N. J. 561, 100 Atl. 2d 674 (R. 32). The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 26 N. J. Super. 562, 98 Atl. 2d 597 (R. 15).

### II.

### Jurisdiction.

Jurisdiction is fully covered in the foregoing petition and the statement therein made is here adopted by reference.

### III.

### Statement of the case.

The petitioner herewith adopts the statement of matters involved set forth in the opinion of the New Jersey Supreme Court and hereinbefore quoted as the trial facts in this case. There is no dispute as to the occurrences but only as to the conclusions of law resulting therefrom.

## IV.

### Assignments of error.

The New Jersey Supreme Court erred as follows:

(1) It held that the action of a trial court in sentencing a defendant to be put on probation for five (5) years, and in addition, fined $500.00, was not a sentence but a suspension of the imposition of a sentence.

(2) It held that the judgment of a trial court that a defendant, upon conviction, be put on probation for a period of five (5) years and fined $500.00 necessarily meant that the imposition of sentence was being suspended, and that although the fine of $500.00 had been paid, the trial court could, two and one half years later, upon finding the defendant guilty of "violation of probation" sentence him to a term of not less than two nor more than three years in State Prison.

(3) It held that "in the instant matter, the defendant received, in full measure, not only the protection of our firmly embedded concepts of due process and fair play but also the benefits of the current penological approaches."

(4) The action of the trial court in sentencing the defendant, upon finding him guilty of "violation of probation" to a term of not less than two nor more than three years in State Prison, subsequent to having sentenced him to be put on probation for a period of five years and fined $500.00, which fine had been paid, put the defendant twice in jeopardy of life or limb, and was contrary to the due process of law required by the Fourteenth Amendment.

## V.

### Summary of argument.

POINT I. The language of the trial court of February 8, 1950 was a sentence and exhausted the power of the court to further punish the accused after the judgment had gone into operation.

POINT II. The action of the trial court in imposing a prison sentence two and one-half years after it had imposed a fine, for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.

## ARGUMENT.

## I.

### The language of the trial court of February 8, 1950 was a sentence and exhausted the power of the court to further punish the accused after the judgment had gone into operation.

There can be no question that the action of the court on February 8, 1950 was the imposition of a sentence. It declared to the accused the legal consequences of the guilt of which he had been convicted.

A sentence denotes the action of the court in which the plea is made or verdict rendered, declaring the consequences to the convicted of the facts ascertained.

> *Stewart* v. *Stewart,* 93 N. J. Eq. 1, 114 A. 851 (Chan. Ct. 1921).

In the technical sense, "sentence" ordinarily is synonymous with "judgment" and denotes the action of a court

of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted.

79 C. J. S. 1042.

The New Jersey Supreme Court decided that the manner in which the court rendered its judgment discloses beyond peradventure that the fine was simply one of the several conditions of the probation. We respectfully submit that this is error, and that, on the contrary, the fine was not a condition of probation but manifestly the punishment or sentence for the offense; it could have been the complete sentence and it might have been payable forthwith, but the trial court decided to place the defendant on probation to liquidate it in instalments. The language used by the sentencing Judge (R. 13) and a reading of the Probation Statute R. S. 2:199-2, *infra* 19 clearly indicate that the $500.00 mentioned by the court was a fine and punishment under R. S. 2:103-6, *infra* 21. The Probation Statute R. S. 2:199-4, *infra* 20 is not concerned with the imposition of a fine, but simply with the liquidation of a fine in one or several sums, as a condition of probation. This is corroborated by the inquiry made by the trial court of counsel (R. 13) to inform the court in what instalments the defendant could pay the fine. Any other construction would permit the court, as a condition of probation, to impose a greater fine than that permitted by the statute as punishment for the offense itself.

It is to be noted that the original judgment of the trial court of February 8, 1950 (R. 13) did not impose a prison sentence nor suspend the execution of a prison sentence. It placed the defendant on probation for a period of five years and fined him $500.00 and costs of $15.00, which were paid. Thereafter, the power of the court to

punish the offender was exhausted and the court had no power or jurisdiction to super-add the sentence of imprisonment of August 20, 1952.

The action of the trial court in placing the accused on probation was not a suspension of sentence. The court did not stop after it stated that it had placed the defendant on probation. Actually, the court proceeded to impose a sentence of a fine of $500.00. Therefore, the court did not suspend sentence but proceeded to impose it by the imposition of the fine. The sentence was fully executed by the payment of the fine, thereby exhausting the power of the court to further punish the offender.

Whole or partial payment of a fine pursuant to a valid sentence is tantamount to commitment of the defendant, within the meaning of the rule that a trial court cannot amend or modify a valid sentence in a criminal case after the defendant has been committed.

*Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872 (1873);

*United States* v. *Murray,* 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 (1928);

*Frankel* v. *United States,* 131 F. 2d 756, (C. C. A. 6th, Mich. 1942);

*Santis* v. *Esola,* 50 F. 2d 516, (C. C. A. 9th 1931);

*Yavorski* v. *United States,* 1 F. 2d 169 (C. C. A. 3d, 1924).

The principle is well-established that a court has no power to impose two sentences for a single offense. It may suspend the judgment of a criminal in toto, until another term, but cannot inflict two sentences for a single conviction by imposing a fine and at a later term super-adding imprisonment.

*Roberts* v. *United States,* 320 U. S. 264, 64 S. Ct. 113 (1943);
*Commonwealth* v. *Hottle,* 139 Pa. Super. 128, 11 Atl. 2d 524, Pa. Super. Ct. 1940.

## II.

**The action of the Trial Court in imposing a prison sentence two and one-half years after it had imposed a fine, for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.**

The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Although the Fourteenth Amendment does not use the words "twice put in jeopardy of life or limb," it does prohibit any state from depriving any person of life, liberty or property, without due process of law.

This honorable Court has, on numerous occasions, reviewed state judgments wherein the accused charged that they had been twice put in jeopardy of life or limb for the same offense. However, in all of those cases this Court found that the petitioner had not been put in double jeopardy and therefore it was unnecessary to decide whether such right is protected by the Fourteenth Amendment.

We believe that the instant case clearly manifests that two separate and distinct sentences, for the same offense, were imposed upon the defendant. Certainly, this must be considered putting the petitioner twice in jeopardy of life or limb and contrary to due process of law within the intendment of the Fourteenth Amendment.

The want of due process of law is a legal or philosophical concept as to the extent to which a state, in the exercise of

its sovereign power, should be permitted to deprive individuals within its jurisdiction of their lives, liberty or property.

*Douglas* v. *City of Jeannette,* Pa. 130 F. 2d 652, 657 (C. C. A. Pa.).

"As a general rule, where accused has executed or entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence; nor can any amendment to the judgment be allowed where it would require a new sentence to be pronounced. It would seem that this rule applies only to the substance of the sentence, that is, to that part of it which prescribes the kind and amount of punishment, and it does not prohibit the alteration of those parts of the sentence which merely direct when its execution shall commence or in what prison it shall be accomplished. Moreover, it is the rule in at least some jurisdictions that where a sentence has been partly executed, it may be revised and another in diminution or mitigation substituted for it during the term. The basis for the allowance of a diminution of punishment, while denying the court's power to increase it, is held to be in the fact that in the latter case accused would be subject to double punishment for the offense."

24 C. J. S. Criminal Law, Sec. 1588, p. 118.

The great principle of the common law forbidding repeated prosecutions for the same offense is of ancient origin. The common law rule against double jeopardy is also the rule in New Jersey being firmly embedded in our law.

*State* v. *Labato,* 7 N. J. 137, 80 A. 2d 617 (Sup. Ct., 1951);

*State* v. *Di Giosia,* 3 N. J. 413, 70 A. 2d 756 (Sup. Ct., 1950);

*State* v. *Mowser,* 92 N. J. L. 474, 106 A. 416 (E. & A., 1919);

*State* v. *Cooper,* 13 N. J. L. 361 (Sup. Ct., 1833).

In *Ex parte Lange,* 85 U. S. 163, 21 L. Ed. 872, 18 Wall. 163 (U. S. Sup. Ct., 1873) the punishment prescribed by the statute was imprisonment for not more than one year or a fine of not less than $10 nor more than $200; but Lange was sentenced to one year's imprisonment and to pay $200 fine. Five days after the imprisonment had begun, after payment of the fine and during the same term, Lange was brought before the same court on a writ of habeas corpus; an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that time. The Supreme Court stated the rule to be, page 167 of 18 Wall., 21 L. Ed. 872: "The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable." The court declared, however, that the power could not be so used as to violate the constitutional guarantee against double punishment, holding (page 173 of 18 Wall., 21 L. Ed. 872) that this guaranty applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment

that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

But the court immediately proceeded to say, page 174 of 18 Wall., 21 L. Ed. 872:

"If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first."

Then returning to the question of double punishment, and reciting that Lange had paid the fine and had undergone five days of the one year's imprisonment first imposed, the court said, page 175 of 18 Wall., 21 L. Ed. 872:

"• • • Can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

## Conclusion.

It is manifest from the foregoing facts that the petitioner has been sentenced twice for the same offense and consequently has been twice placed in jeopardy of life or limb. This Honorable court, on the occasions when the question of double jeopardy in state matters has been considered, has only had occasion to answer that double jeopardy did not factually exist. The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Does the Fourteenth Amendment afford the accused similar protection against state action? This question should be ruled upon by this Honorable court.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey should be granted.

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## Appendix.

### Statutes.

P. L. 1929, Chapter 156 (R. S. 2:199-1 *et seq.*).

R. S. 2:199-1. Power of courts to suspend sentence and place on probation; period of probation.

When it shall appear that the best interests of the public as well as of the defendant will be subserved thereby, the courts of this state having jurisdiction over criminal or quasi-criminal actions shall have power, after conviction or after a plea of guilty or *non vult* for any crime or offense, to suspend the imposition or execution of sentence, and also to place the defendant on probation under the supervision of the chief probation officer of the county, for a period of not less than one year nor more than five years.

The courts having jurisdiction over children's or domestic relations cases, when it shall appear that the best interests of the public as well as of the person adjudged guilty of any offense before such court will be subserved thereby, shall have power to place the defendant on probation for a period of not less than one year nor more than five years. Such courts shall also have power to place on probation under the same conditions children who shall come within the jurisdiction of the court.

If any person placed on probation shall abscond while under supervision, the time during which he remains away or hidden shall not be counted as part of his term of probation.

R. S. 2:199-2. Conditions of probation.

The court shall determine and may, at any time, modify the conditions of probation, and may, among others, include any of the following: That the probationer shall avoid injurious, immoral or vicious habits; shall avoid places or persons of disreputable or harmful character; shall report to the probation officer as directed by the court or probation officer; shall permit the probation officer to visit him at his

place or abode or elsewhere; shall answer all reasonable inquiries on the part of the probation officer; shall work faithfully at suitable employment; shall not change his residence without the consent of the court or probation officer; shall pay a fine or the costs of the prosecution, or both, in one or several sums; shall make reparation or restitution to the aggrieved parties for the damage or loss caused by his offense; shall support his dependents.

R. S. 2:199-4. Termination or extension of probation; violation of conditions; arrest and detention; sentence.

Upon a report from the chief probation officer that the probationer has complied with the conditions of probation and that the best interests of the public and the probationer will be subserved thereby or for other good cause, the court, may, at any time, discharge a person from probation, or may extend the probation period within the limits of the maximum period provided by section 2:199-1 of this title.

At any time during the probation period the court may issue a warrant and cause the probationer to be arrested for violating any of the conditions of his probation, or any probation officer, police officer, or other officer with power of arrest, upon the request of the chief probation officer, may arrest the probationer without a warrant; and a commitment by such probation officer setting forth that the probationer has, in his judgment, violated the conditions of his probation shall be sufficient warrant for the detention of such probationer in the county jail, house of detention or local prison, when designated in the commitment, until he can be brought before the court. Such probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing the manner in which the probationer has violated his probation. Thereupon the court, after summary hearing, may continue or it may revoke the probation and the suspension of sentence, and may cause the sentence imposed to be executed or impose any sentence which might originally have been imposed.

R. S. 2:103-6. Misdemeanors; punishment.

Any person found guilty of any crime which by any statute is declared to be a misdemeanor, and for which no punishment is specifically provided, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment, with or without hard labor, as the court may direct, for a term not exceeding three years, or both.

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FEB 27 1954

HAROLD B. WILLEY, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953.

No. 561 .

ANTHONY ADAMO,
*Petitioner,*

*vs.*

LLOYD W. McCORKLE, Acting Principal Keeper of the New Jersey State Prison at Trenton,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.*

## BRIEF FOR THE RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953.

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No.....

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ANTHONY ADAMO,
Petitioner,

*vs.*

LLOYD W. MCCORKLE, Acting Principal Keeper of the New Jersey State Prison, at Trenton,
Respondent.

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## BRIEF OPPOSING PETITION FOR CERTIORARI.

### I.

### Reference to Official Report of Opinion Delivered in the Court below.

The Supreme Court of New Jersey, the court immediately below, reversed the judgment of the Superior Court of New Jersey, Appellate Division.

The opinion of the Supreme Court of New Jersey is officially reported in 13 N. J. 561, 100 A. 2d 674 (R. 32).

The opinion of the Superior Court of New Jersey, Appellate Division, is officially reported in 26 N. J. Super. 562, 98 A. 2d 597 (R. 15).

## II.

### Counter-statement Concerning Jurisdiction.

Counsel for petitioner states that the jurisdiction of this Court is invoked under the due process clause of the Fourteenth Amendment, and also under Title 28, U. S. C. A., Sec. 1257(e).

We respectfully submit that the decision of the Supreme Court of New Jersey, reversing the judgment of the Superior Court of New Jersey, Appellate Division, involving the questions presented in the petition herein, is in conformity with the provisions of the United States Constitution respecting due process of law and double jeopardy(1), and it is submitted that the Supreme Court of New Jersey did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction to review the decision of the Court below.

## III.

### Counter-statement of the Case.

On January 24, 1950, the petitioner, Anthony Adamo, was tried and convicted by a judge and jury in the Bergen County Court, New Jersey, upon two indictments for the crime of assault.(2)

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(1) Constitution of the United States, Amendment XIV, Sec. 1:
"* * * nor shall any state deprive any person of life, liberty or property without due process of law; * * *"
Constitution of the United States, Amendment V:
"* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *"

(2) Under N. J. Rev. Stat. 1937, Title 2:103-1 (now N. J. S. 2A:85-1):
"Assaults, batteries, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

The offense of assault was, at the time of its commission, a misdemeanor punishable by a fine not exceeding $1,000 or by imprisonment for a term not exceeding three years, or both.[3]

On February 8, 1950, the court placed petitioner on probation for five years, one of the conditions of the probation being the payment of a fine of $500.[4]

Petitioner paid the $500 fine prior to May 16, 1952.

On May 16, 1952, he was charged with violation of probation; and after hearings, on August 13, 1952, he was found guilty and his probation was revoked.

On August 20, 1952, the court imposed the following sentence for violation of probation: two concurrent terms of not less than two nor more than three years in State Prison.

Thereafter petitioner applied for a writ of habeas corpus to the Law Division of the Superior Court of New Jersey, Bergen County, to test the validity of the County Court's sentence of August 20, 1952, claiming that the fine of $500 formed part of the original sentence of February 8, 1950; that when the fine was paid the sentence was fully executed and the power of the court to punish for the crime was exhausted; that the order for probation was nugatory

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(3) R. S. 2:103-6; now N. J. S. 2A:85-7.

(4) At the time of sentence the court said (R13a-20):

> "It is the judgment of this court that this defendant be put on probation for a period of five years. He is to report once a week to the Probation Officer of this County, the time and place to be fixed by the Probation Office. He is to obey all the rules of the Probation Office which generally speaking means that he is to observe the law of this State, of the United States, and of any State where he may be permitted to go. He is not to leave the State of New Jersey, without the permission of either the Probation Officer or the Judge of the Court. In addition to this he will be fined $500.00 This fine may be paid in installments."

and there was no legal basis for the prison sentence for violation of probation.

The writ was granted, and after hearings and arguments, the Superior Court, Law Division, on April 9, 1953, discharged the writ of habeas corpus.

On appeal, the Appellate Division of the Superior Court, reversed the judgment of the Law Division, it being held by the majority of the Court that, because the trial court failed to expressly suspend the imposition of sentence the order of probation was void; that the imposition of the $500 fine formed part of the original sentence; that payment of the fine constituted execution of the sentence; and that the subsequent prison sentence was based upon an invalid order of probation and was of no effect.

Thereafter, the State took an appeal, and upon certification granted, the New Jersey Supreme Court reversed the Appellate Division, and it was held in a majority opinion that the probation was necessarily predicated upon an implied suspension of imposition of sentence; that a formal expression of suspension of imposition of sentence was not essential to the validity of the probation; that the fine was only one of the conditions of the probation; that payment of the fine did not constitute a complete satisfaction of petitioner's obligation to comply with the other terms of the probation; and that the prison sentence for violation of probation was a legal sentence.

Petitioner now petitions this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

## IV.

### Summary of the Argument.

We respectfully submit:

First: The imposition of the fine did not form part of the sentence, but it was one of the conditions of the probation; and payment of the fine did not constitute an execution of the sentence.

By placing the petitioner on probation, the trial court impliedly suspended the imposition of sentence.

Second: The court's action in imposing a sentence of imprisonment for violation of probation was in accordance with statutory authority and it did not constitute double jeopardy or denial of due process of law.

## V.

## ARGUMENT.

### POINT ONE.

**The imposition of the fine did not form part of the sentence, but it was one of the conditions of the probation; and payment of the fine did not constitute an execution of the sentence.**

**By placing the petitioner on probation, the trial court impliedly suspended the imposition of sentence.**

Following petitioner's conviction on two charges of assault on January 24, 1950, the court could have imposed,

on each charge, a prison sentence of not more than 3 years, or a fine not exceeding $1,000, or both (R. S. 2:103-6; now N. J. S. 2A:85-7).

However, this was the pronouncement of the court at the time of sentence on February 8, 1950.

> "It is the judgment of this court that this defendant be put on probation for a period of five years. He is to report once a week to the Probation Officer of this County, the time and place to be fixed by the Probation Office. He is to obey all the rules of the Probation Office which generally speaking means that he is to observe the law of this State, of the United States, and of any State where he may be permitted to go. He is not to leave the State of New Jersey without the permission of either the Probation Officer or the Judge of the Court. In addition to this he will be fined $500.00. This fine may be paid in installments."

Petitioner paid the $500 fine prior to May 16, 1952.

On the latter date, May 16, 1952, he was charged with violation of his probation, and after hearings on the charge, he was found guilty and, on August 13, 1952, his probation was revoked.

On August 20, 1952, the court sentenced him for the violation of probation to a prison term of not less than 2 nor more than 3 years.

We cannot agree with petitioner's contention that, (1) the fine formed part of the sentence and payment of the fine constituted an execution of the sentence; (2) the failure of the court to expressly state that he was suspending the

imposition of a jail sentence rendered the probation invalid; (3) the subsequent imposition of the prison sentence for alleged violation of probation was illegal because it was founded upon a void sentence of probation; and (4) the subsequent prison sentence placed petitioner in double jeopardy in violation of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

## A.

### The fine was a condition of the probation and not a part of the sentence for the offense.

In order to determine the question whether the fine could properly be imposed as one of the conditions of probation or whether it was part of the sentence for the offense, as well as the questions of whether the legality of the probation depended upon an express declaration of suspension of sentence, and whether the prison sentence imposed for violation of the probation was a legal sentence, it is important to examine the history and development of the probation law of New Jersey.

Prior to 1906 New Jersey had no statute on probation. At common law, the court could suspend either the imposition or execution of a sentence. (*State* v. *Addy,* 43 N. J. L. 113, Sup. Ct., 1881; *State* v. *Osborne,* 79 N. J. Eq. 430, Ch., 1911; *State* v. *Braunstein,* 5 N. J. Misc. R. 243, Sup. Ct., 1927). However, the court could not suspend a part of any sentence. (*State* v. *Addy, supra; State* v. *Clifford,* 84 N. J. L. 595, Sup. Ct., 1913).

It was not until 1906 that the first probation act was adopted (Laws of 1906, p. 107, sec. 187, of Criminal Pro-

cedure Act, 2 Comp. Stat. 1910, p. 1881). That act did not provide for imposition of a fine *and* probation.

By an amendment of 1907, it was provided that, "instead of imposing the penalty provided by law for such crime," the court could order the defendant's release on probation upon specific conditions fixed by the court, and one of the conditions the court could fix was "the payment of a fine or costs of prosecution, or both." It also provided that in the event of revocation of probation the court could impose a sentence which could originally have been imposed for the offense. (Laws of 1907, c. 209).

This was the law which was in effect at the time of the sentence in the instant case (February 8, 1950), the provisions of the 1906 and 1907 acts being carried over into the Revised Statutes, 1937, Title 2:199-1, 2 and 4.

Substantially the same provisions are now contained in the present Probation Law under N. J. S. 2A:168-1, 2 and 4 (effective January 1, 1952).

Under R. S. 2:199-1 (now 2A:168-1), the court may "suspend the imposition or execution of sentence, *and also* to place the defendant on probation for a period of not less than 1 year nor more than 5 years * * *" (Italics ours), and this power of probation may be exercised "When it shall appear that the best interests of the public as well as of the defendant will be subserved thereby."

Under R. S. 2:199-2 (now 2A:168-2), the court "shall determine and may, at any time, modify the conditions of probation, and *may, among others, include* any of the following * * * *a fine* or the costs of the prosecution, or both, in one or several sums; * * *." (Italics ours).

Under R. S. 2:199-4 (now 2A:168-4), in the event of the violation of the terms of probation, the court may revoke the probation and suspension of sentence, "and may cause the sentence imposed to be executed *or impose any sentence which might originally have been imposed.*" (Italics ours).

Thus, from the above sections of the probation law in New Jersey at the time of the sentence the court had the statutory authority to do the following things: (1) to suspend the imposition of sentence *and* place the defendant on probation (Sec. 1); (2) to include a fine as one of the conditions of the probation (Sec. 2); and (3) in the event of violation of probation to revoke the probation and suspension of sentence and impose a sentence which could originally have been imposed (Sec. 4).

In order not to contravene the rule established in *State* v. *Addy, supra,* that the court could not suspend *a part of the sentence,* the Legislature made it possible for the court to suspend the imposition of sentence and impose a fine, not as part of the sentence for the offense, but *as a condition of probation.*

The New Jersey statute differs from the Federal Probation Act (Criminal Procedure, 18 U. S. C. A., sec. 3651) in that, while the Federal Act contains a specific provision that, where "an offense is punishable by both fine and imprisonment, the court may impose a fine *and* place the defendant on probation as to imprisonment," the New Jersey statute does not contain such a provision.

While it has been held in the Federal courts that under the Federal statute a fine may be imposed either as a pun-

ishment or as one of the conditions of probation (*Mitchem* v. *U. S.*, 193 F. 2d 55, 5 Cir. 1951; *Hollandsworth* v. *U. S.*, 34 F. 2d 423, 4 Cir. 1929), in New Jersey the rule in *State* v. *Addy, supra,* has been modified by statute to the extent that the imposition of a fine may be made a condition of the probation.

In the instant case, the respondent takes the position that a reading of the pronouncement of the court clearly indicates that it was the predominant intent of the court to place the defendant on probation, and to make payment of the fine one of the conditions of the probation.

If the court intended that the fine should form part of the sentence, it would have been very simple for the Court to commence his sentence by stating that he was imposing a fine of $500. But this the court did not do.

Instead, the court's first statement was that, "It is the judgment of this court that this defendant be put on probation for a period of five years."

It then proceeded to prescribe the terms and conditions of the probation; such as fixing the time and place for defendant's reporting to the probation office; admonishing the defendant to observe the laws of New Jersey, the United States or any State to which the defendant would be permitted to go; and that he should not leave the jurisdiction without the permission of the probation office. Then, without any apparent pause or break in the fixing of the conditions, the court added, "In addition to this he will be fined $500.00," and it permitted the fine to be paid in installments of $10 per month covering almost the entire five-year period of probation.

Could there be any possible question that the fine was an additional condition of the probation, and that it did not form any part of the sentence which could be imposed for the offense, particularly when the broad scope and remedial purposes of the probation law, as herein outlined, is taken into consideration?

We submit the court below properly construed the imposition of the fine as one of the conditions of the probation and not as part of the sentence for the offense, and that payment of the fine did not alter or terminate the petitioner's obligation to comply with all the other terms of probation.

**B.**

**There was an implied suspension of imposition of sentence and the judgment of probation was legal.**

The trial court omitted to precede the judgment of probation with an express declaration that imposition of sentence was being suspended.

The respondent takes the position that an express statement that the sentence was being suspended was not essential to the legal efficacy of the probation, and that the judgment of probation without such express declaration necessarily implied that the court was suspending the imposition of sentence.

It has been established by this Court that an order placing the defendant on probation without first formally sentencing him is a final judgment for purposes of appeal. (*Korematsu* v. *U. S.*, 319 U. S. 432, 63 S. Ct. 1124, 87 L. Ed. 1947, 1949; *Berman* v. *U. S.*, 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204, 1937).

In the *Korematsu* case, *supra*, it is stated (p. 435 of 319 U. S.):

> "The difference to the probationer between imposition of sentence followed by probation, as in the Berman Case, and suspension of the imposition of sentence, as in the instant case, is one of trifling degree. Probation, like parole, 'is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency,' Zerbst *v.* Kidwell, 304 U. S. 359, 363, 82 L. Ed. 1399, 1400, 58 S. Ct. 872, 116 A. L. R. 808, and this end is served in the same fashion whether or not probation is preceded by imposition of sentence. In either case, the liberty of an individual judicially determined to have committed an offense is abridged in the public interest. 'In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.' " (Citing and quoting from *Berman* v. *U. S., supra*).

In the instant case, at the time of sentence, the court immediately announced, "It is the judgment of this court that this defendant be put on probation for a period of five years."

Can it be said that a formal statement of suspension of imposition of sentence was indispensable to the legality of the probation, in view of the remedial purposes of the probation law hereinbefore outlined under Subdivision A? Could there be any other meaning to the omission of a formal expression than that it must be necessarily implied?

We submit that the only answer to these questions is hat expressed by the New Jersey Supreme Court in its opinion (p. 567 of 13 N. J.):

> "* * * The use of formal language of suspension was not indispensable since the judgment that the defendant 'be put on probation for a period of five years' necessarily meant that the imposition of sentence was being suspended."

We submit that the following language of the dissent in the instant case in the Appellate Division (approved by the Supreme Court) is appropriate, p. 573 of 26 N. J. Super.:

> "I do not believe it to be essential to the legal propriety of a probation order that the court employ some such words as: 'The imposition of sentence is suspended and you are placed on probation for years': or, as: 'You are sentenced to one to three years in New Jersey State Prison; the execution of this sentence is suspended and you are placed on probation for years.' Where the only possible conclusion to be drawn from the order for probation is that the imposition of sentence is suspended, the order should be unobjectionable legally. Here where the form permits but one inference as to the nature of the action taken it would be mere obeisance to words to require the use of the expression, 'Imposition of sentence is suspended,' when the grant of probation is made. Manifestly an order granting probation without more in effect suspends the imposition of sentence."

Further in the same dissenting opinion it is stated significantly, p. 574:

> "Defects in efforts of administration, which are purely formal in nature, ought not to stand in the

> way of its use. While it is true that a defendant should be made aware of the nature of his sentence, it is unrealistic to hold that when probation is granted following conviction of crime, the offender does not know that the imposition of an imprisonment sentence is being suspended, unless such an express statement is made." (Citing and quoting from *State* v. *Pascal,* 133 N. J. L. 528, N. J. Sup. Ct., 1946).

In *Commonwealth* v. *Smith,* 130 Pa. Super. 536, 198 A. 812, 814, where a statute substantially similar to that of New Jersey was involved and defendant was placed on probation following a burglary conviction, the court, in passing upon the legality of the order of probation in connection with the Pennsylvania Probation Act, stated significantly, p. 814 of 198 A.:

> "* * * They are not in the alternative or disjunctive, but in the conjunctive; and, *whether a specific order suspending the imposing of a sentence is made or not, the placing of defendant on probation is, in effect, a suspension of the imposing of sentence."* (Italics ours).

The New Jersey statute (R. S. 2:199-1; now 2A:168-1) also provides that the court may "suspend the imposition * * * of sentence, *and also* to place the defendant on probation." The suspension of the imposition of sentence and the placing on probation are not in the alternative or disjunctive, but in the conjunctive.

Under the circumstances, when the court, at the very inception of the sentence, places the defendant on probation without uttering a specific expression that it is suspending the imposition of a sentence permissible for commission of

the crime, there can be no other meaning to the action than that the imposition of sentence is being impliedly suspended.

It is significant to note, too, that in the instant case neither the defendant nor his counsel made any protest against the sentence at the time it was imposed, and it was not until August 20, 1952, when the sentence for violation of probation was imposed, more than three months after he was charged with violation of probation and long after payment of the fine was attached as a condition of the probation, that any complaint was made against the legality of the sentence.

## POINT TWO.

**The court's action in imposing a sentence of imprisonment for violation of probation was in accordance with statutory authority and it did not constitute double jeopardy or denial of due process of law.**

On February 8, 1950, the time of sentence, the court, under the pertinent statute (R. S. 2:103-1 and 6; now 2A:85-1 and 7), could have imposed a sentence of imprisonment not exceeding three years, or a fine not exceeding $1,000, or both.

But the court saw fit not to impose any sentence for the offense, and it placed petitioner on probation for five years, one of the conditions being the payment of a fine of $500, to be paid in installments.

In effect, the court suspended, or "postponed", the imposition of a sentence for the offense.

Petitioner paid the fine prior to May 16, 1952, and on the latter date he was charged with violation of probation in connection with the other terms and conditions of probation; on August 13, 1952, the probation was revoked; and on August 20, 1952, he was sentenced for violation of probation to two concurrent terms of two to three years in prison.

Under R. S. 2:199-4 (now 2A:168-4), it was provided that upon violation of probation, the court, after hearing, could revoke the probation and "cause the sentence to be executed or *impose any sentence which might originally have been imposed.*"

The first part of the above provision applies where sentence has been imposed but its execution suspended; while the latter portion applies where no sentence has been imposed and the *imposition* of sentence has been suspended, in which case the court was empowered to impose a sentence for the offense which it might originally have imposed.

We submit the instant case falls within the latter category, and that it was completely within the court's function, upon revocation of probation, to impose the sentence it did, from two to three years in prison. The sentence was within the limitations imposed by the statute, R. S. 2:103-6.

We cannot agree that the sentence imposed upon revocation of probation constituted double jeopardy, first, because the fine of $500 was imposed as one of the conditions of probation, as we have pointed out under Point I; and secondly, there never had been any sentence imposed for the offense.

While we do not disagree with the principles in cases cited by petitioner in his Brief, they cannot be made to apply here.

In *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872 (1874), cited (B. p. 13) and quoted from (B. pp. 16-17), the pertinent statute provided for a jail sentence *or* fine, and the court imposed a jail sentence of one year's imprisonment *and* a fine of $200. The defendant was immediately confined, and the following day he paid the fine. Five days later, the court vacated the original sentence imposed for the crime and imposed a new sentence of one year's imprisonment to begin on the latter date. The original sentence was clearly invalid by having punishment imposed for both jail *and* fine when the court could rightfully impose but one or the other; and the fact that the second sentence was made to begin after the defendant had already served five days of the first sentence constituted double punishment for the same offense.

That is not the situation here. The court did not impose any original sentence of either fine or imprisonment, but it placed petitioner on probation. The imposition of sentence for the offense was in effect suspended, and petitioner was placed on probation for five years, one of the conditions of the probation being payment of a fine of $500, which the court could do under the statute (R. S. 2:199-2).

In *U. S.* v. *Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 (1928), cited (B. p. 13), defendant was sentenced to jail for 3 months, and the following day, after he started to serve the jail sentence, he was recalled and placed on

probation. The probation sentence was held illegal because, under the pertinent statute, the judgment of probation should immediately follow any suspension of imposition or execution of sentence, "without any interval of any part of the execution," and a probation sentence could not be imposed after the jail sentence has begun to be served.

In *Frankel* v. *U. S.* 131 F. 2d 756 (C. C. A. 6, 1942) (B. p. 13), defendant was sentenced to pay a fine of $1,500 within 30 days. Before expiration of the 30 days defendant informed the court it was impossible for him to pay it, whereupon the court, before the expiration of the 30-day period, imposed a new sentence of 2½ years in prison. After spending 3 days in prison, also before expiration of the 30 days, defendant offered to pay the fine, which was refused. It was held that the revocation of the fine and imposition of a new prison sentence was erroneous; that the imposition of the fine in the original sentence was a valid sentence; that punishment thereunder had in some respects been suffered; and the court was thereafter precluded from further increasing the original sentence.

In *Santos* v. *Esola,* 50 F. 2d 516 (C. C. A. 9, 1931), cited (B. p. 13), defendant was fined $100, sentenced to jail in default thereof, and upon payment of the fine to be placed on probation for 6 months. Defendant paid the fine but failed to comply with other terms of probation. The probation was revoked and he was again fined $500 with credit for the $100 paid on the first fine, and in default to be confined until payment of the balance of $400.

It was held that the fine of $100 was the original sentence and payment of the fine was a complete execution of the sentence.

In *Yavorski* v. *U. S.*, 1 F. 2d 169 (C. C. A. 3, 1924), cited (B. p. 13), defendant was sentenced to a fine *and* imprisonment of 60 days. After serving 5 days of the jail sentence, he was recalled when the court realized it could not impose both fine *and* jail sentence. The court ordered remission of the fine to defendant, who had paid it when the sentence was imposed, but the defendant refused to accept it and challenged the legality of the sentence. It was held that the court could not remit the fine *after* the punishment imposed had been suffered.

In *Roberts* v. *U. S.*, 320 U. S. 264, 88 L. Ed. 41 (1943), cited (B. p. 14), defendant was sentenced to pay a fine of $250 and imprisonment for 2 years. Execution of the prison sentence was suspended upon condition that he pay the fine, and in addition he was placed on probation for 5 years. Defendant paid the fine and was released from custody. More than 4 years later, the probation was revoked; the original 2-year prison sentence was set aside, and a new sentence of 3 years' imprisonment imposed. One of the grounds of attack upon the legality of the second sentence was that it violated the Fifth Amendment respecting double jeopardy. As to this claim, the Court said, "We do not reach this second conclusion," following the principle that the Amendment guarded against prosecuting a person twice in a new and independent case when he already had been tried once (*Kepner* v. *U. S.*, 195 U. S. 100, 134, 49 L. Ed. 114, 126, 24 S. Ct. 797), or punishing a man for an offense when he already suffered the punish-

ment for it. However, it was held that, although a court is authorized by the Federal Probation Act to "suspend the * * * execution of sentence *and* to place the defendant upon probation * * *", the statute does not give it the power to *set aside* the original sentence and to substitute for it another sentence of increased severity.

That was a case involving the suspension of the *execution* of a sentence imposed, and under such circumstances, after revocation of probation, the case reverts to its status at the time the original sentence was imposed, and the court is powerless to impose any greater punishment than that originally inflicted.

In *Comm.* v. *Hottle,* 139 Pa. Super. 128, 11 A. 2d 524 (Pa. Super. Ct., 1940), cited (B. p. 14), the defendant was on September 16, 1937, sentenced to pay a fine of $50 and costs, and placed on probation until the fine was paid. On September 17 and 18, he paid the fine. On November 23, 1937, the court revoked the sentence of September 16 and directed that defendant be brought before it for further sentence. Defendant was apprehended almost two years later, and he attacked the validity of the order of November 23, 1937. He was sentenced on September 28, 1939, to pay a fine of $1,000 and to a prison term of nine months from the latter sentence. The pertinent statute provided for fine *and* imprisonment, and it was held that the sentence was irrevocable as respects the fine, but not as respects the addition of imprisonment.

In the instant case, there was no sentence imposed for the crime, but petitioner was placed on probation with a fine of $500 attached as one of the conditions of probation. Upon violation of probation the case reverted to its status

at the time of granting of probation and, under the authority of R. S. 2:199-4, the court was clearly free to impose "any sentence which might originally have been imposed."

The following New Jersey cases cited by petitioner (B. pp. 15-16) deal with the forbidding of "repeated prosecutions" for the same offense, and they have no application here involving the legality of sentence.

In *State* v. *Labato*, 7 N. J. 137, 80 A. 2d 617 (S. C., 1951), the defendant was first tried and convicted of unlawful possession of lottery slips in the Municipal Court under the Disorderly Persons Act and he was subsequently indicted for the same offense under the Crimes Act. Defendant's plea of double jeopardy was sustained, it being held that the true test of double jeopardy is whether the evidence necessary to sustain the second prosecution on indictment would have been sufficient to secure a legal conviction on the first prosecution by complaint.

In *State* v. *DiGiosia*, 3 N. J. 413, 70 A. 2d 756 (S. C., 1950), defendant was tried and acquitted of carnal abuse allegedly committed on a certain day named in the indictment. At the trial, the State was allowed to prove other like offenses not barred by the statute of limitations, and the jury were instructed to convict if they found that defendant had committed any of such other offenses. It was held that an acquittal on the charge laid in the indictment constituted a bar to a second prosecution for any of the specific offenses committed within that period.

*State* v. *Mowser*, 92 N. J. L. 474, 106 A. 416 (E. & A., 1919), held that, where the defendant was charged, in separate indictments, with robbery and murder, the murder

being the result of the criminal act of the accused done in perpetration of the robbery, the subsequent prosecution on the indictment for murder was barred, upon the principle that an acquittal or conviction for a lesser offense will bar a prosecution for the greater.

In *State* v. *Cooper,* 13 N. J. L. 361 (Sup. Ct., 1833), defendant was first tried and convicted of arson, and it was held that the conviction barred further prosecution for murder where the murder resulted from the commission of arson.

In the instant case, the petitioner was not being prosecuted a second time for the offense; nor was he being subjected to further punishment for said offense.

The only question was whether the sentence of 2½ to 3 years in State Prison could properly be imposed for violation of probation, and whether the sentence was a legal one.

As we have hereinbefore pointed out, the prison sentence was for violation of probation, and it was not "in addition to the fine of $500," which was but one of the conditions of probation.

The legality of the prison sentence for violation of probation must be upheld in view of the basic purpose of probation, which this Court has clearly described in *Roberts* v. *U. S., supra,* as follows:

> "to provide an individualized program offering a young unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continued power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity."

When the petitioner was first brought before the court for sentence on February 8, 1950, the court in effect suspended the imposition of any sentence and immediately placed petitioner on probation; and the court specifically imposed the fine of $500 as one of the conditions of the probation, and the fine did not form any part of the original sentence which had been suspended.

The prison sentence imposed on August 20, 1952 was for violation of probation, which the court was empowered to do by virtue of statutory authority (R. S. 2:199-4).

We, therefore, respectfully submit that there is no merit to petitioner's contention that he was denied the safeguard against double jeopardy under the Fifth Amendment, or that he was denied due process of law guaranteed by the Fourteenth Amendment.

## VI.

## Conclusion.

**For the reasons herein set forth, we respectfully submit that the writ of certiorari should be denied.**

Respectfully submitted,

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